INDEX

	Page
Opinions below	1
Jurisdiction	1
Statute involved	2
Question presented	2
Statement	2
A. The Board's finding of facts	2
B. The Board's conclusions and order	5
C. The decision of the court of appeals	6
Summary of argument	7
Argument	12
I. The Board properly concluded that Section 8(b)(1)(A) of the Act prohibits peaceful picketing by a union which does not represent a majority of the employees, to compel immediate recognition as the employees' bargaining representative	13
Introduction	13
A. The Board's interpretation comports with the established meaning of the terms "restrain or coerce," as used in Section 8(b)(1)(A)	17
B. The Board's interpretation is supported by the legislative history of Section 8(b)(1)(A)	23
C. The Board's interpretation has reasonable limits, and thus would not interdict legitimate union activity as well	33
D. The arguments advanced to the contrary do not militate against the Board's interpretation	40
1. The contention that Section 13 of the Act immunizes the picketing in this case	40
2. The contention that the regulation of recognition picketing contained in Section 8(b)(4)(C) precludes coverage of the same subject matter by Section 8(b)(1)(A)	45

Argument—Continued
I. The Board properly concluded, etc.—Continued
D. The arguments advanced, etc.—Continued
3. The contention that other portions of the legislative history negate the Board's interpretation of Section 8(b)(1)(A) ..... Page 50
II. In the Board's view, the new amendments to the Act do not affect the validity of the order here 53
Conclusion 61
Appendix 62

CITATIONS

Cases:

American Newspaper Publishers Ass'n v. *National Labor Relations Board*, 193 F. 2d 782, certiorari denied, 344 U.S. 812 42
American Newspaper Publishers Association v. *National Labor Relations Board*, 345 U.S. 100 51
American Stevedores v. *Porello*, 330 U.S. 446 50
Automobile Workers v. *Wisconsin Board*, 336 U.S. 245 ..... 32, 45
Bakery Drivers Local v. *Wohl*, 315 U.S. 769 17
Bernhard-Altmann Texas Corp., 122 NLRB No. 142 27
Brooks v. *National Labor Relations Board*, 348 U.S. 96 ..... 38, 47
Building Service Employees v. *Gazzam*, 339 U.S. 532 22
Capital Service, Inc. v. *National Labor Relations Board*, 204 F. 2d 848, affirmed on other grounds, 347 U.S. 501 ..... 16, 21
Communications Workers v. *National Labor Relations Board*, 215 F. 2d 835 20
Denver Bldg. Trades Council, 90 NLRB 1768, enforced, 192 F. 2d 577 42
District 50, United Mine Workers v. *National Labor Relations Board*, 234 F. 2d 565 26
Dixie Bedding Manufacturing Co. v. *National Labor Relations Board*, 268 F. 2d 901 26
Ekco Products Co., 117 NLRB 137 34
Garner v. *Teamsters Union*, 346 U.S. 485 42
Hall Freight Lines, 65 NLRB 397 28
Hudson Water Co. v. *McCarter*, 209 U.S. 349 36
Hughes v. *Superior Court*, 339 U.S. 460 17
International Association of Machinists (Alloy Mfg. Co.), 119 NLRB 307 16

Cases—Continued

	Page
International Brotherhood of Teamsters, etc. (Ready Mixed Concrete Co.), 117 NLRB 1266	47
Lane v. *National Labor Relations Board*, 186 F. 2d 671	20
Lewis Food Co. v. *Meat Drivers Union*, 159 F. Supp. 763	47
Local 1976, Carpenters' Union v. *National Labor Relations Board*, 357 U.S. 93	47
Local No. 224, International Union, Allied Industrial Workers (Queen Ribbon Co.), 116 NLRB 890	48
McLeod v. *National Maritime Union*, 157 F. Supp. 691	47
Medford Bldg. Trades Council, 96 NLRB 165	42
National Labor Relations Board v. *George D. Auchter Co.*, 209 F. 2d 273	20
National Labor Relations Board v. *Babcock & Wilcox Co.*, 351 U.S. 105	35
National Labor Relations Board v. *Buzza-Cardozo*, 205 F. 2d 889, certiorari denied, 346 U.S. 923	35
National Labor Relations Board v. *B.V.D.*, 237 F. 2d 545	19
National Labor Relations Board v. *Draper Corp.*, 145 F. 2d 199	43
National Labor Relations Board v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685	19
National Labor Relations Board v. *Express Publishing Co.*, 312 U.S. 426	48
National Labor Relations Board v. *International Association of Machinists, etc.*, 241 F. 2d 695	21
National Labor Relations Board v. *International Association of Machinists*, 263 F. 2d 796, union petition for certiorari pending, No. 57, this Term	16, 36
National Labor Relations Board v. *International Rice Milling Co., Inc.*, 341 U.S. 665	41
National Labor Relations Board v. *Knickerbocker Plastic Co.*, 218 F. 2d 917	26
National Labor Relations Board v. *Knitgoods Workers' Union, Local 155*, 267 F. 2d 916	14, 21
National Labor Relations Board v. *Lion Oil Co.*, 352 U.S. 282	34, 50, 51
National Labor Relations Board v. *Local 420, etc.*, 239 F. 2d 327	21
National Labor Relations Board v. *Local 55, Carpenters*, 205 F. 2d 515	20

Cases—Continued

	Page
National Labor Relations Board v. *Local 404, Teamsters*, 205 F. 2d 99	19
National Labor Relations Board v. *Mackay*, 304 U.S. 333	35
National Labor Relations Board v. *National Maritime Union*, 175 F. 2d 686, certiorari denied, 338 U.S. 954	42
National Labor Relations Board v. *Pennsylvania Greyhound Lines*, 303 U.S. 261	27
National Labor Relations Board v. *Philadelphia Iron Works*, 211 F. 2d 937	20
National Labor Relations Board v. *Reed*, 206 F. 2d 184	20
National Labor Relations Board v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620	19
National Labor Relations Board v. *Truck Drivers Local Union No. 449*, 353 U.S. 87	36
National Labor Relations Board v. *United Brotherhood of Carpenters, etc., Local 517*, 230 F. 2d 256	21
National Labor Relations Board v. *United Rubber Workers*, 269 F. 2d 694, petition for certiorari pending, No. 316, this term	16, 21, 34, 41, 46, 48, 49, 60
National Labor Relations Board v. *United Steelworkers*, 357 U.S. 357	36
National Labor Relations Board v. *Women's Wear Co.*, 159 F. 2d 866	49
National Maritime Union, 78 NLRB 971	27, 28
Paint, Varnish & Lacquer Makers Union (*Andrew Brown Co.*), 120 NLRB 1425	47
Pappas v. *Stacey*, 151 Me. 36, 116 A. 2d 497, appeal dismissed, 350 U.S. 870	22
Parks v. *Atlanta Printing Pressmen*, 243 F. 2d 284, certiorari denied, 354 U.S. 937	47
Pennsylvania v. *Wheeling and Belmont Bridge Co.*, 18 How. 421	58
Perry Norvell Co., 80 NLRB 225	27, 28, 53
Radio Broadcast Technicians (*WKRG–TV*), 123 NLRB No. 55 (April 1, 1959)	37
Rainwater v. *United States*, 356 U.S. 590	57
Red Star Express v. *National Labor Relations Board*, 196 F. 2d 78	21
Republic Aviation Corp. v. *National Labor Relations Board*, 324 U.S. 793	15, 36, 38

Cases—Continued

	Page
Retail Store Employees Union, Local 1595 (J. C. Penney Co.), 120 NLRB 1535	37
Sierra Furniture, 125 NLRB, No. 20	58-59
Teamsters v. *Vogt*, 354 U.S. 284	22
Truck Drivers Union, Local 728 v. *National Labor Relations Board*, 249 F. 2d 512, certiorari denied, 355 U.S. 958	42
Tungsten Mining Corp. v. *District 50*, 242 F. 2d 84, certiorari denied, 355 U.S. 821	47
United Mine Workers v. *Arkansas Oak Flooring Co.*, 351 U.S. 62	51, 52
United Mine Workers v. *National Labor Relations Board*, 184 F. 2d 392, certiorari denied, 340 U.S. 934	42
United States v. *Mine Workers*, 330 U.S. 258	57
Warehouse Union, Teamsters Local 688 (Coca Cola Co.), 116 NLRB 923	47

Statutes:

Labor Management Relations Act, 1947, Title IV, 41 Stat. 160:	
Section 401	51
Section 402(7)	52
Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519	12, 66
Section 702	39
Section 704(c)	66
National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 151, *et seq.*:	
Section 1	14
Section 7	2, 6, 7, 8, 9, 14, 16, 18, 19, 20, 32, 33, 34, 37, 62
Section 8(a)	48, 62
Section 8(a)(1)	7, 8, 9, 14, 15, 19, 26, 30, 31, 35, 48, 62
Section 8(a)(2)	8, 26, 62
Section 8(a)(3)	41
Section 8(a)(5)	33
Section 8(b)	2, 45, 48, 63
Section 8(b)(1)(A)	2, 6, 7, 8, 9, 10, 11, 12, 15, 16, 17, 19, 20, 21, 22, 23, 26, 27, 28, 29, 30, 31, 33, 35, 36, 37, 38, 39, 40, 41, 42, 45, 46, 48, 49, 50, 52, 53, 54, 55, 57, 58, 59, 60, 63.

Statutes—Continued

	Page
National Labor Relations Act, Etc.—Continued	
Section 8(b)(2)	41, 42
Section 8(b)(3)	33
Section 8(b)(4)	11, 49, 63
Section 8(b)(4)(A)	10, 41, 46, 63
Section 8(b)(4)(B)	10, 11, 41, 46, 47, 48, 49, 63
Section 8(b)(4)(C)	10, 11, 21, 40, 45, 46, 47, 48, 49, 63
Section 8(b)(7)	11, 12, 53, 54, 55, 57, 58, 59, 60, 66
Section 8(d)	51
Section 9	33
Section 9(c)(3)	34, 38, 39
Section 10(j)	11, 49, 64
Section 10(l)	11, 49, 64
Section 13	10, 40, 41, 42, 45, 66
Wagner Act, 49 Stat. 449:	
Section 7	43, 44
Section 8(1)	19, 25, 49
Section 13	43, 44
Miscellaneous:	
93 Cong. Rec.:	
Pp. 4016, 4017, 4025, 4434, 4435, 4436, 4437	26
P. 4017	29
P. 4023	29
P. 4024	29
Pp. 4270–4271	30
P. 4431	31
P. 4432	26
P. 4435	26
P. 4436	26, 30
P. 6443	32, 45
105 Cong. Rec. (Daily Ed.):	
P. 5964, 5969	57
P. 14183	56
P. 14515–14516	57
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Miscellaneous—Continued Page
H. Conf. Rep. No. 245, 80th Cong., 1st Sess. 45
H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 32, 44, 45
H. Rep. No. 741, 86th Cong., 1st Sess. 57
H. Rep. No. 1147, 86th Cong., 1st Sess. 59
Leg. Hist. of the Labor-Management Relations Act, 1947 (G.P.O., 1948):
I Leg. Hist.:
P. 112 24
P. 113 24
P. 176 24
Pp. 205–206 24
Pp. 317–319 45
P. 418 34
P. 428 24
P. 434 44
P. 456 25
Pp. 543–544, 546, 562–563 32
P. 547 32
P. 563 44
II Leg. Hist.:
Pp. 1018, 1021, 1203, 1205, 1206, 1209 26
Pp. 1019–1020 29
P. 1029 29
P. 1030 29
P. 1031 29
Pp. 1138–1139 30
P. 1197 31
P. 1199 26
P. 1204 26
P. 1207 26, 30
P. 1539 32, 45
S. Rep. No. 573, 74th Cong., 1st Sess. 15, 49
S. Rep. No. 105, 80th Cong., 1st Sess. 24, 25, 34, 44
S. Rep. No. 986, 80th Cong., 2d Sess. 51, 52, 53
S. Rep. No. 187, 86th Cong., 1st Sess. 57
Twenty-first Annual Report of the Board (Govt. Print. Off., 1957), p. 152 49
Twenty-second Annual Report of the Board (Govt. Print. Off., 1958), p. 142 49

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 34

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

DRIVERS, CHAUFFEURS, HELPERS, LOCAL UNION NO. 639, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 183–188) is not yet officially reported. The findings of fact, conclusions of law, and order of the Board (R. 12–60) are reported at 119 NLRB 232.

JURISDICTION

The judgment of the court of appeals (R. 188) was entered on November 26, 1958. Certiorari was granted on April 20, 1959 (R. 189). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended, 61 Stat. 147, 29 U.S.C. 160(e).

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).
>
> * * * * *
>
> SEC. 8(b). It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: * * *

QUESTION PRESENTED

Whether peaceful picketing by a union, which does not represent a majority of the employees, to compel immediate recognition as the employees' exclusive bargaining agent is an unfair practice under Section 8(b)(1)(A) of the National Labor Relations Act.

STATEMENT

A. THE BOARD'S FINDING OF FACTS

In September 1953, the Union [1] was certified by the

[1] Respondent, Drivers, Chauffeurs and Helpers Local 639, International Brotherhood of Teamsters. The employer, Curtis

National Labor Relations Board as the exclusive bargaining representative of the drivers, helpers, warehousemen and furniture finishers of Curtis Brothers, following its victory in a Board-conducted election (R. 13; 95, 114). The Union and the Company thereafter entered into contract negotiations, and eventually reached agreement on all subjects with the exception of union security (R. 13, 64; 115, 140–141). An impasse was reached on this point, and on February 26, 1954, the Union struck in support of its contract demands (R. 13, 64; 115). Nine of the 21 employees in the bargaining unit joined in the strike (R. 64; 115). Picket lines were established in front of the Company's store and also in front of its warehouse. The warehouse, through which all the employees in the unit entered and left the premises, forms an "L" wing with the store and faces a side street (R. 13, 64–65; 116, 124, 126, 152).

Thereafter, the 9 strikers were replaced, and the Company continued to remain open for business. The picketing continued, however, and was in effect at the time of the hearing before the Board trial examiner in June and July 1956, nearly two and one-half years later (R. 13, 117, 124–125, 144). At the outset of the strike as many as 15 or 20 pickets patrolled together, but as time went on the number was reduced to about 6, and finally, from about November 1955 on, no more than two pickets appeared,

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Brothers, is engaged in Washington, D.C., in the retail furniture, storage, household moving and rug cleaning businesses (R. 63–64).

neither of whom was an employee of the Company (R. 65, 67; 116, 117, 125, 181).

On February 1, 1955, about one year after the strike had begun, the Company filed a petition with the Board requesting that a representation election be held to determine whether the employees in the bargaining unit continued to desire the Union to represent them (R. 13; 101, 117–118). The Union opposed the holding of such an election, and mailed to the Board's regional director a letter prepared by Union counsel stating that the Union "herewith abandons all claims to exclusive recognition as the majority bargaining representative" of the employees involved (R. 14; 97, 158–159). On February 17, 1955, the day after the above letter was mailed, the Union for the first time during the strike did not picket the Company's place of business. It resumed the picketing the next day, however, with changed signs (R. 65; 118–119). Prior to February 17, the legend on the picket signs had read: "Curtis Brothers on strike. Unfair to organized labor" (R. 14; 117). Thereafter, two legends were used, which read, respectively: "Curtis Bros. employs nonunion drivers, helpers, warehousemen and etc. Unfair to Teamsters Union No. 639, AFL," and "Teamsters Union No. 639 AFL wants employees of Curtis Bros. to join them to gain union wages, hours, and working conditions" (R. 14; 99, 100, 119, 166). Following a hearing in the representation case, the Board found, contrary to the Union's contention, that the Union "was still seeking to win immediate recognition by the Company," and therefore directed that an election be conducted

(R. 14; 101–105). The election was held in October 1955, with 28 employees voting against the Union and only one employee voting for it (R. 14; 106, 108).

The picketing continued after the election as before, ordinarily consisting of two pickets carrying the signs which were adopted following the letter of disclaimer in February 1955 (R. 67; 125, 144, 160). Shortly after the election, however, the picketing was confined to the sidewalk area starting in front of the store and extending to a driveway exit from the parking lot, which was contiguous to the store. No further picketing was carried on, as it had been theretofore, in front of the warehouse where the single employee entrance is located (R. 67; 124, 126, 149, 152, 154–155). The pickets patrolling in front of the store could be seen from the warehouse entrance only by looking diagonally across the parking lot over a distance of about a city block (R. 126–127, 152). The pickets during this period were present from about 8:30 in the morning until the store's closing at 9 in the evening, although the employees in the unit worked from 8 in the morning until 5 in the afternoon (R. 67; 133-134). The pickets neither talked with the employees nor distributed literature to them while on patrol (R. 67; 160, 179–80).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board (with one member dissenting) concluded that, even after it had been rejected by a majority of the employees in a Board-conducted election, the Union continued to picket the Company for the purpose of compelling it to grant the Union

immediate recognition as the employees' exclusive representative (R. 15). The Board further concluded that picketing by a minority union for such a recognition objective restrains and coerces the employees involved in the exercise of their right of free choice in the selection of a representative, in violation of Section 8(b)(1)(A) of the Act (R. 17–20, 23–33).

To remedy the foregoing violation, the Board's order requires the Union to cease and desist from restraining or coercing the Company's employees in the exercise of their rights guaranteed in Section 7 of the Act, and to post appropriate notices (R. 33–34).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals (with one judge dissenting) set aside the Board's order (R. 183–188). The court concluded that "§ 8(b)(1)(A) is inapplicable to peaceful picketing, whether 'organizational' or 'recognitional' in nature," being impelled to this conclusion "by the impact which § 8(b)(1)(A) would have upon other provisions of the Act were any different interpretation adopted" (R. 185). The court stated (R. 185–186):

> * * * if 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, § 13, which prohibits interference with the right to strike except as *specifically* provided for elsewhere in the Act, would effectively be expunged therefrom; § 8(b)(1)(A) does not specifically sanction picketing or striking. * * * Similarly,

since §8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of §8(b)(1)(A) would make the former section entirely redundant.

SUMMARY OF ARGUMENT

I

A. One of the basic policies of the Act is to afford employees full freedom of choice in the designation of representatives for purposes of collective bargaining. Implementing this policy, Section 7 of the Act provides that employees shall have the right to bargain collectively through representatives of their own choosing and the correlative right to refrain from any or all such activity. To foist upon employees a bargaining representative unwanted by a majority of them thus clearly negates the statutory guaranty accorded to employees to select their own representatives or to have none at all. An employer who grants exclusive recognition to a union which lacks majority support restrains and coerces his employees in violation of Section 8(a)(1). By the same token, picketing of a minority union to compel recognition as the exclusive bargaining representative restrains and coerces employees in violation of Section 8(b)(1)(A).

Picketing for recognition by a minority union is designed to cause economic loss to the employer's business so long as he refuses to recognize the union. Such economic pressure, in turn, tends to restrain or coerce the employees, for business loss to the employer necessarily jeopardizes their economic status.

The threat thus posed to their livelihood prompts the employees to avoid the risk by foregoing their Section 7 rights and accepting the picketing union as their representative. Such economic compulsion constitutes restraint and coercion within the meaning of Section 8(b)(1)(A). Plainly, there is no more effective and unequivocal way to restrain an employee than by causing a deprivation of his livelihood.

Employer action threatening or adversely affecting job tenure has long been regarded as the classic example of restraint and coercion proscribed by Section 8(a)(1) of the Act. There is no meaningful basis for exempting minority picketing for recognition, which also threatens the employees' job tenure unless the employer yields, from the proscription of Section 8(b)(1)(A) against union restraint or coercion of employees in the exercise of their Section 7 rights.

B. The legislative history confirms this interpretation of Section 8(b)(1)(A). One of the major purposes which the sponsors of Section 8(b)(1)(A) sought to achieve was to impose on unions, insofar as possible, the same restrictions already imposed on employers by Section 8(a)(1) respecting intrusion upon protected employee activity. Bringing picketing by a minority union for recognition within Section 8(b)(1)(A) achieves the intended even-handed application of the two sections. An employer violates Section 8(a)(1) of the Act (as well as Section 8(a)(2)) by according exclusive recognition to a minority union. The union's conduct in this case is the counterpart of such employer action, for its objective is the same, namely, deprivation of the employees' right to

make a free choice with respect to representation. Accordingly, if Section 8(b)(1)(A) is to be given its intended equivalent meaning, it should reach the economic sanctions invoked by a minority union to achieve exclusive recognition, just as Section 8(a)(1) reaches recognition of a minority union by an employer.

C. The Board's interpretation of Section 8(b)(1)(A) does not prohibit legitimate union activity. The argument that equating peaceful picketing with restraint or coercion for purposes of Section 8(b)(1)(A) results, by logical extension, in proscribing a majority union's strike for recognition or contract concessions, overlooks the considerations which underlie the Board's reading of the statute. In the case of a majority union which is striking for recognition or contract concessions, there is no Section 7 right which is infringed and therefore an essential ingredient for a violation of Section 8(b)(1)(A) is lacking. Resort to economic sanctions by a majority union is in furtherance, and not in derogation, of the statutory policies. In contrast, no statutory policy is furthered by a minority union's insistence upon exclusive recognition. Indeed, such recognition would clearly abridge one of the most important rights guaranteed by Section 7.

The distinction which the Board has drawn achieves a balance between practices inimical to the organizational freedom of employees and the protection of legitimate competing interests which must be recognized in the collective bargaining relationship. Accordingly, properly viewed, the Board's interpretation

of Section 8(b)(1)(A) to proscribe minority picketing for recognition poses no threat to legitimate union activity.

D. Section 13, which insures against diminution of the right to strike except as "specifically provided for" in the Act, does not militate against the Board's construction of Section 8(b)(1)(A). The circumstance that the latter section does not expressly refer to strike conduct or picketing does not necessarily bring into play the immunity which Section 13 accords to strike action. Section 8(b)(1)(A), like each of the other unfair labor practice sections, is a specific provision, and if conduct may properly be found to be within the coverage of such a provision, prohibition thereof is "specifically provided for" within the meaning of Section 13 and therefore not immune. If minority picketing for recognition is within the reach of Section 8(b)(1)(A) independently of the impact of Section 13, the latter section does not remove the applicability of the former.

E. Finally, the regulation of recognition picketing contained in Section 8(b)(4)(B) and (C) does not exclude regulation of minority picketing for recognition under Section 8(b)(1)(A). The Board's construction of Section 8(b)(1)(A) leaves to Section 8(b)(4)(B) and (C) a fully independent scope, both in terms of coverage and remedy. First, the latter two provisions, unlike Section 8(b)(1)(A), reach recognition strikes even when the union in question represents a majority of the employees. Section 8(b)(1)(A) comes into play in a recognition context only where the recognition objective is pressed by a minor-

ity union. Second, there are differences in these provisions in terms of the remedy. Where a violation of Section 8(b)(4) is involved, Section 10(l) of the statute makes it mandatory that application be made to a district court for temporary injunctive relief. With respect to violations of Section 8(b)(1)(A), Section 10(j) of the statute vests the Board with discretionary authority to seek such relief in particular cases. In short, any duplication between Section 8(b)(4) (B) and (C) on the one hand and Section 8(b)(1)(A), on the other, is minimal in character and affords no substantial basis for ignoring the ordinary meaning which attaches to the words "restrain or coerce" in Section 8(b)(1)(A).

II

The Board believes that the new amendments to the Act, effective November 13, 1959, do not impair the validity of, or require any modification in, the order here. Section 8(b)(7), added by the new amendments, specifically proscribes picketing for recognition or organizational purposes in certain circumstances. In enacting the new provision, Congress did not specifically purport to resolve the question then pending in the courts of whether the Board already had power under Section 8(b)(1)(A) to regulate some aspects of that activity. Rather, it undertook to regulate the subject in a more detailed and comprehensive manner, and—in the Board's view—left Section 8(b)(1)(A) available, were the Board's interpretation ultimately sustained, as a sup-

plemental means of regulation. The Board finds support for this conclusion in the savings clause at the end of Section 8(b)(7), which provides that: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this Section 8(b)."

ARGUMENT

The instant case arose under the National Labor Relations Act, as amended in 1947. The basic question presented is whether Section 8(b)(1)(A) of that Act proscribes picketing by a minority union to gain recognition as the exclusive bargaining representative of the employees involved. As noted above, the Board has concluded that it does. Following the Board's decision and the ruling below, Congress enacted the Labor-Management Reporting and Disclosure Act of 1959 (Public Law 86–257, 73 Stat. 519), which amends in various respects the National Labor Relations Act. Among those amendments is a provision dealing with recognition and organizational picketing. The Board is of the view that these supervening amendments do not affect the conclusions which it reached in the instant case under the provisions of the Act as amended in 1947, and that its order is entitled to enforcement if those views prevail. Accordingly, in this brief we deal first with the issues in the context of the 1947 Act (pp. 13–53, *infra*), and secondly with the impact of the 1959 amendments, if any, upon that issue (pp. 53–60, *infra*).

I. THE BOARD PROPERLY CONCLUDED THAT SECTION 8(B)(1)(A) OF THE ACT PROHIBITS PEACEFUL PICKETING BY A UNION WHICH DOES NOT REPRESENT A MAJORITY OF THE EMPLOYEES, TO COMPEL IMMEDIATE RECOGNITION AS THE EMPLOYEES' BARGAINING REPRESENTATIVE

INTRODUCTION

It is undisputed, and the facts set forth in the Statement (pp. 2–5, *supra*) show, that the Union continued to picket the premises of Curtis after it had been rejected by Curtis' employees in a Board-conducted election. Moreover, the facts show, and we do not understand the Union to contend otherwise in this Court, that an object of this post-election picketing was to compel Curtis to recognize it as the exclusive bargaining agent of its truck drivers and warehousemen even though it did not represent a majority of them.[2] The Union thus sought an objective which

[2] Thus, the Union admittedly sought a contract which entailed immediate recognition at the outset of the picketing in February 1954. It continued picketing through October 1955, after the Board election revealed that it lacked majority support, without taking any steps which would indicate a *bona fide* change in this objective. To be sure, when Curtis petitioned for a Board election in February 1955, the Union sent a letter to the Board's Regional Officer disclaiming any desire for current recognition and modified its picket signs to make it appear that it was only seeking to organize the employees (p. 4, *supra*). However, the Union did not communicate its alleged change of objective to the employer, made no attempt to couple the picketing with any of the conventional organizing techniques and, indeed, conducted the picketing at times when, and at an entrance where, the employees sought to be organized could not be reached (p. 5, *supra*). In these circumstances, the Board was warranted in concluding that the Union's disclaimer of recognition was merely a tactical maneuver designed to block a representation election, and that, after the election as before, it was in fact seeking immediate recognition as the

is contrary to one of the basic policies of the Act, and which Curtis could not lawfully grant. Section 1 declares that it is a policy of the Act to afford employees "full freedom" in the "designation of representatives of their own choosing." Section 7 implements this policy by specifically providing that employees shall have the right "to bargain collectively through representatives of their own choosing, * * * and shall also have the right to refrain from any or all such activities." To foist upon employees a bargaining representative unwanted by a majority of them clearly negates, contrary to the Act's policy, their Section 7 right to select their own representative, or to have no representative at all. Accordingly, it is well settled that an employer, who grants exclusive recognition to a union which lacks majority support, restrains and coerces his employees in violation of Section 8(a)(1) (see pp. 26–27, *infra*).

The question presented here is whether Congress left a union free to exert economic pressure on the employer and his employees, through peaceful picketing, to compel accession to an objective in derogation of the employees' Section 7 rights and the employer's obligations under the Act. In the Board's view, Congress did not leave this avenue open, but instead regulated picketing for such objective under Section 8(b)(1)(A). That Section makes it an unfair labor practice for a labor organization or its agents to "restrain or coerce * * * employees in the exercise of

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exclusive representative of Curtis' employees. See *National Labor Relations Board* v. *Knitgoods Workers' Union, Local 155*, 267 F. 2d 916, 919–920 (C.A. 2).

the rights guaranteed in section 7." It is the Board's position that picketing by a union to compel recognition even though it does not represent a majority of the employees restrains or coerces the employees in the exercise of their organizational rights, within the meaning of Section 8(b)(1)(A).

In arriving at this conclusion, the Board was mindful of the fact that the use of general language like "restrain or coerce" to regulate the economic weapons of labor organization entails the risk that wholly legitimate strikes and picketing will be swept under its ban.[3] However, it concluded that Congress, having decided that a curb on picketing and related activity by a minority or stranger union was required when such conduct was clearly inimical to the purposes of the Act, elected not to define the circumstances under which a union shall be regarded as having a minority or a stranger status and when its objectives reach the point of proscription (see pp. 33–40, *infra*). Instead, the Board believes that Congress resolved this problem, as it did in other portions of the Act and in the analogous Section 8(a)(1) in particular, by enacting general prohibitory language and leaving to the Board the task of applying it "in the light of the infinite combinations of events which might be charged as violative of its terms" (*Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798).

Discharging that function here, the Board has concluded that picketing by a union to compel recognition

[3] Indeed, it was on this basis that a provision similar to Section 8(b)(1)(A) was rejected when the Wagner Act was originally enacted. See S. Rep. No. 573, 74th Cong., 1st Sess., p. 16.

after it has been rejected by a majority of the employees can serve no purpose other than to restrain or coerce the employees in the exercise of their Section 7 rights, and must thus be held to be within the ban of Section 8(b)(1)(A). The Board's position has been accepted by the Court of Appeals for the Fourth Circuit in *National Labor Relations Board* v. *United Rubber Workers* (*O'Sullivan Rubber Co.*), 269 F. 2d 694, petition for certiorari filed, No. 316, this Term.[4] The court below, however, rejected the Board's interpretation of Section 8(b)(1)(A), holding that "restrain or coerce," as used therein, does not encompass economic pressure of the type exerted by peaceful picketing, but only such coercive means as physical violence, mass picketing, and threats of direct economic reprisal. We shall show that the Board's conclusion that Section 8(b)(1)(A)

[4] That case involves furtherance of the recognition objective, not only by picketing, but by such other means as blacklisting the employer and appealing to customers to boycott his product. The Board's interpretation of Section 8(b)(1)(A) applies not only to picketing, but also to other economic sanctions utilized by a minority union to further a quest for recognition. See *International Association of Machinists* (*Alloy Mfg. Co.*), 119 NLRB 307, 309.

The Ninth Circuit likewise interpreted Section 8(b)(1)(A), as does the Board, in *Capital Service Inc.* v. *National Labor Relations Board*, 204 F. 2d 848, 851–853, affirmed on other grounds, 347 U.S. 501. However, when the issue was presented to it again, in the *Alloy* case, which like *Rubber Workers* involved both picketing and boycotting in furtherance of a minority union's recognition objective, it sustained the Board's finding that the picketing was a violation of Section 8(b)(1)(A) on procedural grounds, but rejected the finding that the boycott appeals violated that provision. *National Labor Relations Board* v. *International Association of Machinists*, 263 F. 2d 796, union petition for certiorari pending, No. 57, this Term.

reaches the picketing here, which, as we have seen, effectuates the Act's policies, is: (1) permitted by the language of Section 8(b)(1)(A); (2) supported by the legislative history of that Section; and (3) otherwise reasonable. Finally, we shall show that the validity of the Board's interpretation of Section 8(b)(1)(A) is not impaired by the contrary arguments that have been advanced.

A. THE BOARD'S INTERPRETATION COMPORTS WITH THE ESTABLISHED MEANING OF THE TERMS "RESTRAIN OR COERCE," AS USED IN SECTION 8(B)(1)(A)

As this Court has recognized, peaceful picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers Local* v. *Wohl*, 315 U.S. 769, 776 (concurring opinion). The "very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication." *Hughes* v. *Superior Court*, 339 U.S. 460, 465. Indeed, as one informed commentator has observed, peaceful picketing is "a species of pressure or coercion and is intended as such by its users;" it is "a simple process of proscription," designed to impose an "embargo around the picketed premises". Gregory, *Labor and the Law* (Norton, 2d rev. ed., 1958), pp. 301–302.

Consistent with this accepted view as to the nature of peaceful picketing, the Board has described as follows the manner in which such picketing restrains or

coerces employees, when carried on for a purpose in derogation of their Section 7 rights (R. 18):

> * * * the pressure [exerted by picketing] is necessarily an economic one, a device to reduce the business to the point where his financial losses force [the employer] to capitulate to the union's demands. It is immaterial whether the ostensible technique, or the unspoken but necessary consequence is to cut off the employer's labor supply by preventing the employees from reporting to work; to keep the customers from buying his products; or to interrupt deliveries of supplies to the premises. The important fact of the situation is that the Union seeks to cause economic loss to the business during the period that the employer refuses to comply with the union's demands.
>
> And the employees who choose to continue working, while the union is applying this economic hurt to the employer, cannot escape a share of the damage caused to the business on which their livelihood depends. Damage to the employer during such picketing is a like damage to his employees. That the pressure thus exerted upon the employees—depriving them of the opportunity to work and be paid—is a form of coercion cannot be gainsaid. There is nothing in the statutory language of Section 8(b)(1)(A) which limits the intendment of the words "restrain or coerce" to direct application of pressure by the Respondent Union [upon] the employees. The dimunition of their financial security is not the less damaging because it is achieved indirectly by a preceding curtailment of the employer's interests.

In short, in the Board's view, picketing for recognition by a minority union is designed to cause economic loss to the employer's business so long as he refuses to recognize the union. This circumstance, in turn, would tend to restrain or coerce the employees, for business loss to the employer jeopardizes the employees' economic status. They would thus be prompted to avoid the risk by foregoing their Section 7 rights and accepting the picketing union as their representative.

Reading "restrain or coerce" in Section 8(b)(1(A) in this way is consistent with the established meaning of those terms. There is no more effective and unequivocal way to restrain an employee than by causing a deprivation of his livelihood. Thus, action by the employer threatening or adversely affecting job tenure has long been regarded as the classic example of restraint and coercion of employees condemned under both Section 8(1) of the Wagner Act and Section 8(a)(1) of the Taft-Hartley Act. See, *e.g.*, *National Labor Relations Board* v. *Electric Vacuum Cleaner Co.*, 315 U.S. 685, 692–693; *National Labor Relations Board* v. *B.V.D.*, 237 F. 2d 545, 547 (C.A. D.C.); *National Labor Relations Board* v. *Sunrise Lumber & Trim Corp.*, 241 F. 2d 620, 625 (C.A. 2).

Similarly, oral threats by union officials to employees, that refusal to support the union would result in job loss, have been held to constitute restraint and coercion on the part of the union, within the ban of Section 8(b)(1)(A). *E.g.*, *National Labor Relations Board* v. *Local 404, Teamsters*, 205 F. 2d 99,

101–102, n. 2 (C.A. 1); *National Labor Relations Board* v. *Local 55, Carpenters*, 205 F. 2d 515, 516 C.A. 10); *Lane* v. *National Labor Relations Board*, 186 F. 2d 671, 674 (C.A. 10).

Nor is it material that the union action may restrain or coerce employees only indirectly, *i.e.*, through its impact on the employer. As observed by the Court of Appeals for the Third Circuit: "Coercion once-removed is just as effective as if the union were to act upon the employee immediately." *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3). Indeed, since the employer controls employment, the union can ordinarily affect the employees' job tenure only through the medium of the employer. Accordingly, when a union—by means of an illegal union-security agreement or otherwise—causes the employer illegally to interfere with employment, the union's action, apart from any liability incurred by the employer, has been held to constitute restraint and coercion within the meaning of Section 8(b)(1)(A). See, *e.g.*, *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 837–938 (C.A. 2); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3); *National Labor Relations Board* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9); *National Labor Relations Board* v. *George D. Auchter Co.*, 209 F. 2d 273, 275–277 (C.A. 5). And in these situations, not even a showing of actual loss of employment has been required in order to establish restraint and coercion; the existence of a contract which improperly conditions employment upon forfeiture of a Section 7 right is sufficient.

See, *e.g.*, *National Labor Relations Board* v. *International Association of Machinists, Etc.*, 241 F. 2d 695, 696 (C.A. 9); *National Labor Relations Board* v. *Local 420, Etc.*, 239 F. 2d 327, 328–330 (C.A. 3); *National Labor Relations Board* v. *United Brotherhood of Carpenters, Etc., Local 517*, 230 F. 2d 256, 259 (C.A. 1); *Red Star Express* v. *National Relations Board*, 196 F. 2d 78, 81 (C.A. 2).

In sum, by reading "restrain or coerce" to cover economic sanctions, such as peaceful picketing, designed to damage a business and thereby "deprive * * * [employees] of the opportunity to work and be paid" (R. 18), the Board in this case, and the Fourth Circuit in *United Rubber Workers*, 269 F. 2d 694,[5] have simply applied the settled principle that this statutory language encompasses action adversely threatening employee job tenure.

The Board's reading of the words "restrain or coerce" in Section 8(b)(1)(A) to encompass picketing by a minority union, to compel recognition as the employees' representative, also comports with

[5] See also, *Capital Service, Inc.* v. *National Labor Relations Board*, 204 F. 2d 848, 853 (C.A. 9) (n. 4, *supra*), and *National Labor Relations Board* v. *Knitgoods Workers' Union, Local 155*, 267 F. 2d 916, 920 (C.A. 2). Although the latter case involved picketing for recognition in the face of an outstanding certification (Section 8(b)(4)(C)), the court's characterization of the effect of the picketing is equally valid here (267 F. 2d at 920):

> Viewed realistically * * * it brought pressure upon the employees, not by the legitimate arts of persuasion but by making them fear the disappearance of their jobs, to strike and thus lend their weight also to punitive economic pressures against the employers. Such tactics are sharply at variance with the Congressional policy of allowing employees freedom to decide which union, if any, they will join, see § 7 of the Labor Relations Act * * *.

the interpretation given to comparable language in state laws. Thus, in *Building Service Employees* v. *Gazzam,* 339 U.S. 532, this Court sustained the finding of a state court that peaceful picketing was designed to coerce the employees' choice of representatives, contrary to state policy, upon a showing that the picketing had ensued and the employer was placed on a "We Do Not Patronize" list after he had rejected a demand for a union-shop contract and a majority of the employees had voted against joining the union. Similarly, in *Teamsters* v. *Vogt,* 354 U.S. 284, the Court sustained a state court injunction against peaceful picketing by a minority union, on the ground that, because of the economic pressure which the picketing exerted on the employer's business, the state court was warranted in inferring that the ultimate purpose of the picketing was to coerce employees in the exercise of their organizational rights, contrary to state policy. Indeed, in so holding, the Court observed: "For a declaration of similar congressional policy, see § 8 of the National Labor Relations Act" (354 U.S. at 294). Section 8 can be said to reflect the policy of freeing employees from the pressure of the threatened loss of employment caused by union sanctions, exerted under the circumstances existing in *Vogt,* only if the "restrain or coerce" language used in subsection (b)(1)(A) is read as encompassing such sanctions. See also, *Pappas* v. *Stacey,* 151 Me. 36, 116 A. 2d 497, appeal dismissed, 350 U.S. 870.

B. THE BOARD'S INTERPRETATION IS SUPPORTED BY THE LEGISLATIVE HISTORY OF SECTION 8(B)(1)(A)

Section 8(b)(1)(A) was originally proposed on the floor of the Senate as an amendment to the reported committee bill, and was thereafter passed by the Senate and adopted by the House-Senate Conference.

Its introduction occurred against the following background: (1) The hearings before the House and Senate Labor Committees had extensively inquired into the practice of using picketing and other economic sanctions to further union recognition or organization objectives.[6] (2) The House decided to enact a broad ban against such activities. Thus, Section 12(a)(2) of the House Bill proscribed as "unlawful concerted activities" the picketing of "an employer's premises for the purpose of leading persons to believe that there exists a labor dispute involving such employer, in any case in which the employees are not involved in a labor dispute with their employer." Similarly, Section 12(a)(3)(C) proscribed "any strike or other concerted interference with an employer's operations, an object of which is (i) to compel an employer to recognize for collective bargaining a representative not certified under section 9 * * *, or (ii) to remedy practices for which an administrative remedy is available under this Act, or (iii) to compel an employer

[6] See, *e.g.*, *Hearings before the Senate Committee on Labor and Public Welfare*, 80th Cong., 1st Sess., on S. 55 and S.J. 22, pp. 15, 61–63, 130–131, 936, 1497, 1694, 1938. See also *Hearings before the House Committee on Education and Labor*, 80th Cong., 1st Sess., on bills to amend and repeal the National Labor Relations Act, pp. 992–994, 999–1004, 1097–1098.

to violate any law * * *'" (1 Leg. Hist. 205–206),[7] and a provision was added to Section 7, giving employees "the right to refrain" from union or organizational activity. *Id.*, at 176. (3) The bill reported out by the Senate Labor Committee, however, was narrower. Section 8(b)(4)(3) (subsequently renumbered 8(b)(4)(C)) proscribed picketing for recognition and related conduct directed against the primary employer, where "another labor organization has been certified as the representative" of his employees. And Section 8(b)(4)(2) (subsequently renumbered 8(b)(4)(B)) proscribed efforts to compel recognition through secondary pressures. I Leg. Hist. 113.[8] As emphasized in the Report accompanying the Senate Bill (S. Rep. No. 105, 80th Cong., 1st Sess., p. 22, I Leg. Hist. 428): "It is to be observed that the primary strike for recognition (without a Board certification) is not proscribed."[9]

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[7] "Leg. Hist." refers to the two volume legislative history of the Labor Management Relations Act, 1947 (G.P.O., 1948).

[8] These provisions made it an unfair labor practice for a labor organization or its agents to strike or induce employees to stop work: "(2) for the purpose of forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9(a) of the National Labor Relations Act; (3) for the purpose of forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9(a) of the National Labor Relations Act."

[9] But, the Senate bill also contained Section 8(b)(2) (I Leg. Hist. 112), discussed pp. 41–42, *infra*. Thus, if the recognition demand were coupled with a demand for a union shop, there

In a supplement to the Senate Report, five members of the Senate Labor Committee, including Senators Taft and Ball, expressed the view that the Senate Bill as reported had not gone far enough in its regulation of union activity, particularly in failing to accord protection against union restraints imposed in the course of organizing drives. Consequently, they announced their intention to introduce Section 8(b)(1)(A) as an amendment on the floor. Respecting this provision, whose language was copied from Section 8(1) of the Wagner Act which proscribed employer restraints on employee organizational rights, they stated that they could "see no reason whatever why [unions] should not be subject to the same rules as the employers." S. Rep. No. 105, 80th Cong., 1st Sess., p. 50 (Supp. Views), I Leg. Hist. 456. In short, the major purpose which the sponsors of Section 8(b)(1)(A) sought to achieve was to impose on unions, insofar as possible, the same restrictions already imposed on employers respecting intrusion upon protected employee activity.

The same point was repeatedly made during the floor debate on Section 8(b)(1)(A), with emphasis given to the fact that the scope of this Section was to be measured by the many decisions, to the extent applicable, which had established the scope of Section 8(1) of the Wagner Act. Thus, Senator Ball stated that "individual employees in the free exercise of their rights guaranteed by this act are just as much entitled to protection from [coercive] activities of unions

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would be an attempt to cause discrimination and the conduct would be reachable under Section 8(b)(2).

as they are from the same kind of coercive activities on the part of the employers" (93 Cong. Rec. 4432, II Leg. Hist. 1199). Senator Taft pointed out that "All that is attempted is to apply the same provision [Section 8(a)(1)] with exact equality to labor unions" (93 Cong. Rec. 4436, II Leg. Hist. 1207). And Senator Smith explained that Section 8(b)(1)(A) was offered "in order to make it balance with exactly the same provision in section 8(a), which prevents an employer from interfering with or restraining employees in the exercise of their rights"; that it was "designed to protect employees in their freedom to decide whether or not they desire to join labor organizations" (93 Cong. Rec. 4435, II Leg. Hist. 1204). See, also, 93 Cong. Rec. 4016, 4017, 4025, 4434, 4435, 4436, 4437; II Leg. Hist. 1018, 1021, 1032, 1203, 1205, 1206, 1209.

The Board's conclusion that picketing by a minority union to compel recognition is within Section 8(b)(1)(A) achieves the intended even-handed application of that Section and Section 8(a)(1). As shown pp. 17–22, *supra*, such picketing jeopardizes the employees' economic status, and job threats are a well recognized form of restraint banned by Section 8(a)(1). Moreover, it is settled that an employer violates Section 8(a)(1) of the Act—as well as Section 8(a)(2)—by according exclusive recognition to a minority union.[10] The Union's conduct in this case

[10] See, *e.g.*, *Dixie Bedding Manufacturing Co.* v. *National Labor Relations Board*, 268 F. 2d 901 (C.A. 5); *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565, 569 (C.A. 4); *National Labor Relations Board* v. *Knickerbocker Plastic Co.*, 218 F. 2d 917, 922, 924 (C.A. 9); cf. *National Labor*

is the counterpart of such employer action, for its objective is the deprivation of the same employee right, *i.e.*, the right to make a free choice with respect to representation. Accordingly, if Section 8(b)(1)(A) is to be given its intended equivalent meaning, it should reach the imposition by a minority union of economic sanctions to achieve exclusive recognition, just as Section 8(a)(1) reaches recognition of a minority union by an employer.

This analysis is confirmed by other portions of the legislative history of Section 8(b)(1)(A). Section 8(b)(1)(A) was extensively debated, and a number of examples of its application were suggested by its sponsors. Particular emphasis was given to the prohibition of union conduct which was improper irrespective of the legitimacy of its ultimate objective—*e.g.*, mass picketing, violence, threats of direct economic reprisal. See 93 Cong. Rec. 4021, 4435–4436; II Leg. Hist. 1025, 1205–1206.[11] These examples, how-

Relations Board v. *Pennsylvania Greyhound Lines*, 303 U.S. 261, 267. The Board has also held that the minority union itself violates Section 8(b)(1)(A) by entering into and maintaining a contract which accords it exclusive recognition. See *Bernhard-Altmann Texas Corp.* 122 NLRB No. 142.

[11] This emphasis prompted the Board, early in the administration of the amended Act, to take the view that the reach of Section 8(b)(1)(A) was restricted to such improper tactics, and did not necessarily cover peaceful tactics, even though they might have a coercive impact on employees, to obtain illegal objectives. See, especially, *National Maritime Union*, 78 NLRB 971, 982–987; *Perry Norvell Co.* 80 NLRB 225, 238–241. As the Board pointed out in its decision herein, however, these cases did not squarely present the question of whether a minority union's economic sanctions against an employer to obtain exclusive recognition fell within Section 8(b)(1)(A). Thus,

ever, were not intended to exhaust the scope of Section 8(b)(1)(A). As fully described by the Board in its decision herein (R. 27–28), Senator Taft, one of the sponsors of Section 8(b)(1)(A), cited two instances intended to be reached by that provision which involved, as does the present case, peaceful strikes and picketing for the improper purpose of obtaining representation rights by an unwanted union.

Thus, Senator Taft pointed out that the "amendment protects men who may not be members of unions at all. In fact, many of the cases of coercion are * * * cases in which a union which is attempting to organize sends its representatives to the plant and coerces the employees to join that union." To illustrate, he referred to the *Hall Freight Lines* case, 65 NLRB 397, which was characterized as a situation where a union representing the dock employees called a strike to compel the trucking employees, represented by another union, to join the first union. Moreover, when Senator Pepper commented that there was no threat of physical harm in this situation, Senator Taft added: "The main threat was, 'Unless you join our union, we will close down this plant, and you will not have a job.' That was the threat and that is coercion—something which they had no right to do"

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as far as the Board was concerned in deciding this case, they were at best only "dubious precedent" (R. 32). When squarely confronted with the question in this case, the Board thoroughly reexamined the legislative history of Section 8(b)(1)(A), and concluded that the considerations advanced in the text herein precluded adoption in this case of the views expressed in the *National Maritime Union* and *Perry Norvell* cases, "to the extent [they] seem contrary to the results reached here" (R. 32).

(93 Cong. Rec. 4023, II Leg. Hist. 1029). Shortly thereafter, Senator Taft again emphasized "That the men who are coerced may not have anything to do with the union at all", and he cited the case where: A "union went to a plant in California and said, 'We want to organize your employees. Call them in and tell them to join our union.' The employer said, 'We have not any control over our employees. We cannot tell them, under the National Labor Relations Act.' They said, 'If you don't we will picket your plant', and they did picket it, and closed it down for a couple of months" (93 Cong. Rec. 4024, II Leg. Hist. 1030). He concluded with the statement: "There are plenty of methods of coercion short of actual physical violence" (93 Cong. Rec. 4024, II Leg. Hist. 1031).

Likewise, Senator Ball, another sponsor of Section 8(b)(1)(A), illustrated the coverage of the Section by reference to similar acts of union coercion. He gave three examples of the type of activity at which the section was aimed. One covered physicial violence. Another, a threat to double initiation fees. And the third, a case where "Teamsters Local No. 886" had been "picketing an establishment although no members of the union were employed there, in an effort to coerce those who were employed there into joining a union which they did not want to join" (93 Cong. Rec. 4017, II Leg. Hist. 1019–1020).

Nor is the force of these illustrations diminished by the subsequent action which occurred before Section 8(b)(1)(A) was adopted by the Senate. Thus, when the provision was originally introduced it made

it unlawful for a union "to interfere with, restrain or coerce * * * employees," but the word "interfere" was deleted before passage. The word "interfere" was eliminated in response to Senator Ives' fear that otherwise "any conversation, and persuasion, any urging on the part of any person, in an effort to persuade another to join a labor organization, would constitute an unfair labor practice" (93 Cong. Rec. 4270, II Leg. Hist. 1138; see also, *id.* at 4435, 1205). The deletion of this phrase therefore hardly would sanction economic coercion of the type involved here. This is confirmed by the circumstance that both Senators Taft and Ball readily agreed to delete "interfere." Senator Taft stated that such change "would not make any substantial change in the meaning" of Section 8(b)(1)(A) (93 Cong. Rec. 4270–4271, II Leg. Hist. 1138–1139), and Senator Ball observed that the intended parallel meaning of this provision with Section 8(a)(1) would not be affected since employer violations had generally been reached under the "restrain and coerce" language rather than under the prohibition against interference (*ibid.*)

Furthermore, toward the end of the debates on Section 8(b)(1)(A), Senator Taft, in response to the fear expressed by Senator Morse that the provision would slow up organizing drives, assured that it would not "outlaw strikes * * * [nor] prevent anyone using the strike in a *legitimate way,* conducting peaceful picketing, or employing persuasion" (93 Cong. Rec. 4436, II Leg. Hist. 1207; emphasis added). In the light of Senator Taft's earlier illustration of circumstances, such as those here, where picketing was

used to restrain employees in the exercise of their organizational rights, it is hardly likely that this generalized remark was intended as a nullification of the illustrations previously given. Rather, the more reasonable interpretation is that Senator Taft was referring only to strikes or picketing for lawful objectives, such as a strike for recognition by a union which represented a majority of the employees. This reading is buttressed by the fact that he referred to using the strike "in a legitimate way," and Senator Morse, in expressing the fear that Section 8(b)(1)(A) would outlaw "organizational strikes and strikes for recognition", had asserted that "it could easily be construed to prohibit all types of strikes in situations where *some* of the employees are opposed to the strike" (93 Cong. Rec. 4431, II Leg. Hist. 1197; emphasis added). Moreover, after Senator Morse's remarks, Senator Taft and other proponents of Section 8(b)(1)(A) did not waver from their view that its basic purpose was to subject unions, insofar as possible, to the same restrictions as those imposed on employers by Section 8(a)(1) (pp. 25–26, *supra*), and, as we have shown, encompassing picketing by a minority union to compel recognition within Section 8(b)(1)(A) would effectuate this purpose.

In sum, there is a reasonable basis for concluding, as did the Board, that, in adopting Section 8(b)(1)(A) on the floor, the Senate intended to enlarge upon the provisions of the Senate bill, insofar as picketing by a union which represented none or a minority of the employees was concerned, and to proscribe such picketing and related conduct where, as here, it

worked economic coercion on employees to achieve objectives in derogation of their Section 7 rights. That is, Section 8(b)(1)(A) was designed, at least in part, to bring into the Senate bill some of the features of Section 12(a) of the House bill (p. 23, *supra*).

This is substantiated by the action of the House-Senate Conference Committee. The Committee agreed to accept Section 8(b)(1)(A) of the Senate bill in place of Section 12(a) of the House bill, but coupled this with acceptance of the House bill's amendment to Section 7, specifically giving employees the right to refrain from organizational and union activity if they so desired. The Managers on the Part of the House explained the compromise on the ground that the amendment to Section 7, taken in conjunction with Section 8(b)(1)(A), covered much of the ground of Section 12(a). H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 39–40, 42, 58–59, I Leg. Hist. 543–544, 546, 562–563. See also, 93 Cong. Rec. 6443, II Leg. Hist. 1539, where Senator Taft gave substantially the same explanation to the Senate. And see *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, 260, n. 15.[12]

[12] The foregoing analysis is not affected by the statement in the Conference Report that "the primary strike for recognition (without a Board certification) was not prohibited." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 43, I Leg. Hist. 547. Since this is a repetition of the identical language contained in the Senate Report (p. 24, *supra*), which was written before Section 8(b)(1)(A) was added, it is likely that it was automatically carried over to the Conference Report without any thought given to the intervening impact of Section 8(b)(1)(A). In any event, this statement was made in describing Section 8(b)(4)(B), which prohibits secondary strike pres-

C. THE BOARD'S INTERPRETATION HAS REASONABLE LIMITS, AND THUS WOULD NOT INTERDICT LEGITIMATE UNION ACTIVITY AS WELL.

To read "restrain or coerce" in Section 8(b)(1)(A) as encompassing economic pressure on the employer which affects the employees' livelihood does not subject to the ban of that section many forms of legitimate union activity. Thus, it may be urged that such interpretation would include a majority union's strike for recognition or for contract concessions, for such union conduct may well hurt the employer's business and thereby lessen employment opportunities for the minority of the employees who do not support the union. Yet, it is clear that Congress did not desire activity of this kind to be interdicted by Section 8(b)(1)(A) (see pp. 30–31, *supra*).

This contention overlooks the fact that in these situations, unlike where a minority union exerts pressure to compel exclusive recognition, there is no Section 7 right which is infringed, and therefore an essential ingredient for a violation of Section 8(b)(1)(A) is lacking. Section 9 of the Act makes the union designated by a majority of the employees in the bargaining unit "the exclusive representative * * * of all the employees," and Sections 8(a)(5) and 8(b)(3) impose on both union and employer the obligation, upon request, to enter into a collective bargaining relationship. And, to permit the majority representative to use economic sanctions in support of its recognition

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sures to compel recognition even by a majority union. In this context, it was necessary to make clear that such a majority union remained free to compel recognition by striking the primary employer himself, and the reassuring statement just quoted serves that purpose.

or contract demands, furthers these statutory policies. See *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 298 (concurring opinion). In these circumstances, the Section 7 right to refrain from union activity gives way to the principle of majority rule.

On the other hand, no statutory policy is furthered by the insistence that an employer recognize and bargain with a union which does not represent a majority of his employees. Such recognition would clearly abridge a Section 7 right, subverting the very foundation of all legitimate collective bargaining—a freely chosen majority representative. Indeed, where, as here, the employees have just rejected the union "in a fair election conducted by the Board," the frustration of the act's purposes is "the more glaring" (*United Rubber Workers*, 269 F. 2d at 698).[13] Moreover, accession to the union's demands would cause the employer to commit an unfair labor practice (see pp. 26–27, *supra*). Accordingly, in the situation here, it is appropriate to

[13] To permit economic coercion to be exerted in these circumstances, subverts not only Section 7, but also the policy of Section 9(c)(3) of the Act, which precludes the Board from directing more than one election in a bargaining unit during a twelve-month period. Section 9(c)(3) was intended "to impress upon employees the solemnity of their choice, when the Government goes to the expense of conducting a secret ballot * * *" (S. Rep. No. 105, 80th Cong., 1st Sess., p. 12, I Leg. Hist. 418). Where, as here, the employees have just repudiated the union in a Board election, and there is no indication that the union thereafter has been able to change the employees' minds and acquire majority support (cf. *Ekco Products Co.*, 117 NLRB 137, 138), the employees' choice is rendered meaningless if the union could nevertheless force the employer to recognize it as the exclusive bargaining representative.

give effect to the otherwise applicable reach of Section 8(b)(1)(A).

In short, as with the same phraseology in Section 8(a)(1), the terms "restrain or coerce" in Section 8(b)(1)(A) must be read so as to achieve a balance between practices inimical to the organizational freedom of employees and the protection of legitimate competing interests which must be recognized in the collective bargaining relationship. Under Section 8(a)(1), for example, employers have been permitted to replace economic strikers, even though such action exerts, in a literal sense at least, considerable restraint upon the exercise of the right to strike. *National Labor Relations Board* v. *Mackay,* 304 U.S. 333, 345. The propriety of the competing interest of an employer in continuing his business is thus given recognition. However, where an employer responds to strike action by taking steps beyond those which are appropriate to the protection of that interest, *i.e.*, where he discharges the strikers, there is no reason for not applying the "restrain or coerce" language of Section 8(a)(1) to his action. See, *e.g., National Labor Relations Board* v. *Buzza-Cardozo,* 205 F. 2d 889, 890 (C.A. 9), certiorari denied, 346 U.S. 923. A similar "determination of the proper adjustments" between opposing interests is made in the application of Section 8(a)(1) to situations where employers establish limitations on organizational activities on company time and property. See *National Labor Relations Board* v. *Babcock & Wilcox Co.,* 351 U.S. 105, 112; *National Labor Relations Board* v. *United*

Steelworkers, 357 U.S. 357; *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U.S. 793, 797–798. As summarized by this Court, "the ultimate problem is the balancing of the conflicting legitimate interests." *National Labor Relations Board* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87, 96.[14]

Similarly, Section 8(b)(1)(A), in reaching union restraint and coercion, is not unqualified. Where such restraint can be justified as necessary to the protection of a competing interest which the Act recognizes, an accommodation between the interests is required which may privilege the restraint. But, where, as here, no legitimate competing interest is present, the Section can be given unqualified effect.

Congress adopted this method of regulating picketing and related conduct by a minority or stranger union, in an organization or recognition context, because of the fine line which exists between the licit and the illicit in this area. It is easy to label a union as a stranger or a minority union when it has never represented the employees in question.[15] But, suppose, as here, the union originally represented a majority of the employees and thereafter loses that majority; how much time must elapse before such a union may

[14] Compare the observation of Mr. Justice Holmes, speaking for the Court in *Hudson Water Co.* v. *McCarter*, 209 U.S. 349, 355: "All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached."

[15] This is the situation in *National Labor Relations Board* v. *International Association of Machinists*, 263 F. 2d 796 (C.A. 9), union petition for certiorari pending, No. 57, this Term.

appropriately be viewed as a "stranger"? Similarly, where, as here, the union's objective is exclusive recognition without regard to majority status, it is clear that the purpose sought is in derogation of the employees' Section 7 rights. But, suppose the union asserts that its objective is merely to organize the employees, with a view to demanding recognition in the future should majority support be acquired; or that its objective is neither recognition nor organization, but merely an effort to protest non-union conditions which threaten its gains in the organized portion of the industry. The question of whether these other objectives are only a subterfuge for an immediate recognition objective, and, if not, the extent to which economic pressure in support thereof should be privileged, are delicate issues which require evaluation on a case-by-case basis.[16]

[16] Thus, as the Board noted herein, respecting minority picketing for organizational purposes (R. 22): "In words, at least, such conduct falls within * * * the Act. More important, organizational picketing is not tainted, on its face, with the unlawful direct purpose of forcing the commission of an unfair labor practice by the employer and the summary imposition of an unwanted union upon its employees." Hence, although minority picketing for organizational purposes likewise exerts a coercive force upon the employees who prefer to work, there is, unlike in the case of minority picketing for immediate recognition, another legitimate interest, *i.e.*, the right to engage in self-organization, to be balanced, and it may result in privileging the coercion. Accordingly, the Board, here and in subsequent cases (see *Retail Store Employees Union, Local 1595 (J. C. Penney Co.)*, 120 NLRB 1535, 1536, n. 4), has specifically reserved the question of whether minority picketing for organizational purposes would be violative of Section 8(b)(1)(A). And see *Radio Broadcast Technicians (WKRG-TV)*, 123 NLRB No. 55 (April 1, 1959), where the Board sustained the

Instead of working out these problems itself, Congress, at the time of the 1947 amendments to the Act, adopted the course of enacting only general prohibitory language and leaving to the Board the task of giving it specificity (see *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798, p. 15, *supra*). The way in which the Board has performed that task may be illustrated by a further examination of the situation here. Thus, the Union was the certified majority representative of Curtis' employees when it originally struck the Company in support of its contract demands. A Board certification immunizes a union's representative status from challenge on the ground of a loss of majority for a reasonable period, usually a year. *Brooks* v. *National Labor Relations Board,* 348 U.S. 96. During that period, even in the face of a strike in which, as in this case, a majority of the original employees are permanently replaced, the employer is required to treat with the certified representative. And, under Section 9(c)(3), no election may be conducted during a twelve-month period following the initial balloting, for the purpose of unseating an incumbent representative. The foregoing principles would militate against treating the Union as a minority or stranger union during this period when its certification remained vital, irrespective of whether, through replacement of strikers, its majority support had in fact been dissipated. Accordingly, the Board found no

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Trial Examiner's dismissal of a Section 8(b)(1)(A) complaint, predicated on the finding that, on the facts of that case, the union's object was not recognition but merely the protection of its bargaining position with competing unionized stations.

violation of Section 8(b)(1)(A) respecting the Union's picketing from February 1954, when the strike began, until October 1955, when the Union was decertified in a Board election.

After that point, however, the balance changed. When the certification year has passed and Section 9(c)(3) no longer bars an election, the overall policies of the Act may ordinarily best be served by permitting, upon proper application, a redetermination of the employees' desires concerning representation, regardless of whether the employer and union are locked in an unresolved economic struggle. Otherwise, the employees, who are entitled under the Act to be represented by a union of their choice, would be prevented from extricating themselves from a situation where a representative they no longer support continues indefinitely to perpetuate unrest and conflict in their name, as their legally designated representative. Hence, after the strike and the picketing had gone on for about 19 months, it was clearly appropriate to hold a new election and give the present complement of employees, who had validly and permanently replaced the strikers and thus were the only ones entitled to have a voice in the designation of a representative,[17] an opportunity to make their wishes known. And, when the results of that election showed

[17] Section 9(c)(3) of the act, as it read prior to the recent amendments, provided that employees "on strike who are not entitled to reinstatement shall not be eligible to vote" in a Board election. Under the amendments, however, such employees are now eligible to vote under certain circumstances. See Sec. 702 of the Labor-Management Reporting and Disclosure Act of 1959, 73 Stat. 519, 542, Pub. Law 86-257.

that these employees overwhelmingly rejected the Union, their rights required vindication. It was, therefore, reasonable for the Board to conclude, as it did, that, after the election, the Union was relegated to the status of a minority or stranger union, and any continued efforts on its part to compel recognition were within the ban of Section 8(b)(1)(A).

In sum, the general provisions of Section 8(b)(1)(A), as applied to picketing and related activity by a minority or stranger union, are not without limit. They are a reasonable means of regulating this complex subject, enabling the Board to balance the conflicting interests which are present in each case, and to make the refinements which are called for by varying factual situations.

D. THE ARGUMENTS ADVANCED TO THE CONTRARY DO NOT MILITATE AGAINST THE BOARD'S INTERPRETATION

The court below, in concluding that Section 8(b)(1)(A) should not be construed to cover peaceful picketing for recognition by a minority union, indicated that its conclusion was "necessitated" by Sections 13 and 8(b)(4)(C) of the Act, and was "confirmed" by both legislative history and post legislative history (R. 185–186). We show below that neither these nor the other contentions which have been advanced against the Board's reading of Section 8(b)(1)(A) are meritorious.

1. The contention that Section 13 of the Act immunizes the picketing in this case

Section 13 of the Act provides: "Nothing in this Act, except as specifically provided for herein, shall be

construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." The court below concluded that "if Section 8(b)(1)(A) were made applicable to the practice of striking or picketing itself, rather than to the violent conduct which may accompany those practices, Section 13, which prohibits interference with the right to strike except as specifically provided for elsewhere in the Act, would effectively be expunged therefrom" (R. 185).[18] This contention presupposes that an unfair labor practice provision of the Act, to escape the limitations of Section 13, must expressly refer to strike conduct. But this premise is demonstrably erroneous. Thus, Section 8(b)(2) does not expressly prohibit strikes, and yet strikes to compel a discharge by an employer, in violation of Section 8(a)(3) of the Act,

[18] Section 13 refers in terms only to a strike, and not to picketing or related economic sanctions. However, in *National Labor Relations Board* v. *International Rice Milling Co., Inc.*, 341 U.S. 665, this Court relied on Section 13 to support its holding that Section 8(b)(4)(A) and (B), the Act's secondary boycott provisions, should not be read to encompass picketing of the primary employer's plant for the purpose of securing recognition (*id.*, at 673). Although this shows that the term "strike," as used in Section 13, may include picketing, it does not tell us when another provision of the Act may be deemed to have removed picketing from the protection of that Section. The Court had no occasion in that case to decide the applicability of Section 8(b)(1)(A) to the union conduct involved. Indeed, it specifically noted that, insofar as the picketing there was alleged to be coercive, "the complaint more properly [should] have relied upon Section 8(b)(1)(A)" (341 U.S. at 672). See also, *National Labor Relations Board* v. *United Rubber Workers*, 269 F. 2d 694, 699 (C.A. 4), union petition for certiorari pending, this Term.

have never been deemed to fall within the protective cloak of Section 13, but are instead violations of Section 8(b)(2) of the Act. See, *e.g.*, *United Mine Workers* v. *National Labor Relations Board*, 184 F. 2d 392 (C.A.D.C.), certiorari denied, 340 U.S. 934; *National Labor Relations Board* v. *National Maritime Union*, 175 F. 2d 686, 688–689 (C.A. 2), certiorari denied, 338 U.S. 954; *American Newspaper Publishers Ass'n* v. *National Labor Relations Board*, 193 F. 2d 782, 802–804 (C.A. 7), certiorari denied on this point, 344 U.S. 812. Similarly, picketing by a minority union to secure a contract compelling union membership as a condition of employment has been held to constitute an attempt to cause illegal discrimination within the meaning of that section. See *Denver Bldg. Trades Council*, 90 NLRB 1768, enforced, 192 F. 2d 577 (C.A. 10); *Medford Bldg. Trades Council*, 96 NLRB 165; cf. *Garner* v. *Teamsters Union*, 346 U.S. 485. Moreover, it is plain, as the court below concedes, that Section 8(b)(1)(A) outlaws violent strikes and picketing, although that section does not contain the terms "strikes" or "picketing." The short of the matter is that Section 8(b)(1)(A), like each of the other unfair labor practice sections, is a specific provision, and, if conduct may properly be found to be within the coverage of such a provision, prohibition thereof is "specifically provided for" within the meaning of Section 13 and therefore not immune. See *Truck Drivers Union, Local 728* v. *National Labor Relations Board*, 249 F. 2d 512, 515 (C.A.D.C.), certiorari denied, 355 U.S. 958.

The correctness of this reading of Section 13 is confirmed by the established meaning of that provision

under the Wagner Act, and the clear evidence that Congress did not intend to change that meaning by the 1947 amendments. Thus, the language of Section 13 under the Wagner Act was even more sweeping in its restriction against interference with strikes than the present language. It then read: "Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike". The limiting phrase, "exeept as specifically provided for herein," and the concluding clause, "or to affect the limitations or qualifications on that right," were added in 1947. It was settled law under the Wagner Act, however, that employees who engaged in a strike for improper objectives were not protected by Section 13 against discharge or other penalties. That is, Section 13's protection against interference with the right to strike did not in any event extend to strikes for objectives which were in conflict with the policies of the Act. Indeed, such was the holding in *National Labor Relations Board* v. *Draper Corp.*, 145 F. 2d 199 (C.A. 4), which involved the same kind of illegal objeetive as that presented in the instant case—recognition by an employer of a minority group. As the court pointed out, in sustaining the employer's right to discharge for such activity, economic action to force collective bargaining with a minority representative is contrary to the "purpose of the act * * * to give to the employees as a whole, through action of a majority, the right to bargain with the employer," and therefore cannot be regarded as protected by either Sections 7 or 13 (145 F. 2d at 203, 205).

No change in this holding was effected by the 1947 amendments. As explained in the Senate Report with respect to Section 13 as it was ultimately enacted (S. Rep. 105, 80th Cong., 1st Sess., p. 28, I Leg. Hist. 434):

> It should be noted that the Board has construed the present act as denying any remedy to employees striking for illegal objectives. (See *American News Co.*, 55 NLRB 1302, and *Thompson Products*, 72 NLRB 150.) The Supreme Court has interpreted the statute as not conferring protection upon employees who strike in breach of contract (*N.L.R.B.* v. *Sands Manufacturing Company*, 306 U.S. 332); or in breach of some other Federal law (*Southern Steamship Company* v. *N.L.R.B.*, 316 U.S. 31); or who engage in illegal acts while on strike (*Fansteel Metallurgical Corp.* v. *N.L.R.B.*, 306 U.S. 240).
>
> This bill is not intended to change in any respect existing law as construed in these administrative and judicial decisions.

Similarly, the House Conference Report emphasized that Section 13 "recogniz[ed] that the right to strike is not an unlimited and unqualified right." H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 59, I Leg. Hist. 563.

In sum, Congress explicitly approved the decisions which had refused to immunize union conduct which, although peaceful, had objectives inimical to the purposes of that Act.[19] The amendment to Section 13

[19] This approval was also evidenced in the amendment to Section 7, granting employees "the right to refrain" from the organizational and concerted activities protected by that Section (pp. 24, 32, *supra*). This amendment, according to Senator Taft, "demonstrates a clear intention that these undesirable concerted activities [conduct in support of improper objec-

both recognized that such conduct should not be regarded as protected, by providing that nothing in the Act should "affect the limitations or qualifications on [the] * * * right [to strike]," and allowed for the coverage of such conduct under the subsections of Section 8(b), by providing exceptions to the protection of Section 13, "as specifically provided for herein." See the discussion on this point in *Automobile Workers* v. *Wisconsin Board*, 336 U.S. 245, 258–265. Accordingly, if, as we have shown, minority picketing for recognition may be regarded as within the reach of Section 8(b)(1)(A) independently of the impact of Section 13, the latter section does not remove the applicability of the former.

2. The contention that the regulation of recognition picketing contained in Section 8(b)(4)(C) precludes coverage of the same subject matter by Section 8(b)(1)(A)

The court below further states (R. 18) that, "since Section 8(b)(4)(C) expressly makes illegal picketing for recognition if a union has already been certified as bargaining representative, the Board's construction of Section 8(b)(1)(A) would make the former section entirely redundant." It may also be noted that Section 8(b)(4)(B) also expressly covers recognition picketing in the context of a secondary boycott, *i.e.*, it proscribes inducement of strikes on the part of neutral employees for the purpose of putting pressure on

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tives] are not to have any protection under the act * * *." 93 Cong. Rec. 6443, II Leg. Hist. 1539. See also H. Rep. No. 245, 80th Cong., 1st Sess., pp. 26–28, I Leg. Hist. 317–319; H. Conf. Rep. No. 510, 80th Cong., 1st Sess., pp. 38–40, I Leg. Hist. 542–544.

another employer to grant recognition, unless the union seeking recognition has been certified by the Board (see pp. 24, 32, n. 12, *supra*).

As the Fourth Circuit pointed out in *United Rubber Workers*, 269 F. 2d 694, 699–700:

> We do not think that this argument justifies the robbing of § 8(b)(1)(A) of the meaning to which its terms entitle it. The circumstances under which this section was inserted in the Act support the view that it should be given a broad interpretation in order to protect employees from coercive conduct not only of the employer but also of labor organizations. When the statute was first reported out of committee in the Senate it contained § 8(b)(4)(B) and (C) but did not contain § 8(b)(1)(A). Five members of the committee, including Senators Taft and Ball, were of the opinion that the bill was not stringent enough to regulate certain union activities and accordingly sought amendments on the floor which resulted in the addition of the last named section. Hence it may fairly be recognized as an enlargement of the bill originally reported so as to make provision for circumstances not covered by § 8(b)(4)(B) and (C) as originally incorporated therein. * * *

See also, pp. 25–32, *supra*.

Moreover, a careful reading of these interrelated provisions will show that the Board's construction of Section 8(b)(1)(A) leaves both to Sections 8(b)(4)(B) and 8(b)(4)(C) a fully independent scope, both in terms of coverage and remedy. As for coverage, the latter two provisions, unlike Section 8(b)(1)(A), reach recognition strikes even when the union in

question represents a majority of the employees whom it seeks to represent. See *Paint, Varnish & Lacquer Makers Union (Andrew Brown Co.)*, 120 NLRB 1425, 1428, n. 5. Thus, in the two restricted situations covered by Section 8(b)(4)(B) and (C), Congress determined that no strike action should be permitted (subject to the exception explicitly stated in Section 8(b)(4)(B)), regardless of the majority status of the union. The desirability of protecting the neutral employer against employee pressure was deemed to outweigh the interest of a majority union in striking in the situation covered by Section 8(b)(4)(B).[20] Similarly, in the situation covered by Section 8(b)(4)(C), the respect which should be accorded a certification, until revoked, was considered to outweigh a rival union's interest in striking, even though it may have succeeded in winning a majority of the employees away from the certified union.[21] It may be noted that majority strikes in the latter situation are not an infrequent occurrence, particularly where an outstanding certification has been in effect a long period of time. See, *e.g., Warehouse Union, Teamsters Local 688 (Coca Coca Co.)*, 116 NLRB 923; *International Brotherhood of Teamsters, Etc. (Ready Mixed Concrete Co.)*, 117 NLRB 1266; *Local No. 224, International Union, Allied*

[20] Cf. *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93.

[21] See *Parks* v. *Atlanta Printing Pressmen*, 243 F. 2d 284 (C.A. 5), certiorari denied, 354 U.S. 937; *Tungsten Mining Corp.* v. *District 50*, 242 F. 2d 84 (C.A. 4), certiorari denied, 355 U.S. 821; *Lewis Food Co.* v. *Meat Drivers Union*, 159 F. Supp. 763, 766–767 (S.D. Calif.); *McLeod* v. *National Maritime Union*, 157 F. Supp. 691, 694–695 (S.D. N.Y.). Cf. *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 103–104.

Industrial Workers (Queen Ribbon Co.), 116 NLRB 890.

Under the Board's interpretation, however, Section 8(b)(1)(A) comes into play in a recognition context where the recognition objective is pressed by a minority union. There is, of course, some overlapping of these provisions, since Sections 8(b)(4)(B) and 8(b)(4)(C) are applicable to strikes for recognition by a minority union, as well as a majority union.[22] But for that matter, there is also an indisputable degree of overlapping between Sections 8(b)(4)(B) and 8(b)(4)(C) where a strike in opposition to an existing certification occurs in a secondary boycott situation. Such minimal duplications in as complex a statute as the Labor Management Relations Act are scarcely grounds for overturning the ordinary meaning of the statutory language. Moreover, in particularizing in some of the later subsections of 8(b) conduct that is also covered by the more general language of 8(b)(1)(A), Congress was only following the established pattern of draftsmanship employed in Section 8(a), where subsequent subsections deal with specific forms of employer restraint and coercion prohibited in Section 8(a)(1). See, *e.g., National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S.

[22] However, these sections would proscribe a recognition demand by a minority union only where it was furthered by strikes or the inducement thereof. Section 8(b)(1)(A), as read by the Board would, on the other hand, cover attaining the recognition objective by other means as well, such as oral appeals to employers and circularization of a "We do not Patronize" list or the consumer boycott. See *United Rubber Workers, op. cit., supra.*

426, 433; *National Labor Relations Board* v. *Women's Wear Co.*, 159 F. 2d 866, 867 (C.A. 2).[23]

Finally, as the Court in *United Rubber Workers* noted (269 F. 2d at 700), there are differences in these provisions in terms of remedy. That is, even in the situations where the same conduct would be covered by Section 8(b)(1)(A) as well as by Sections 8(b)(4)(B) or 8(b)(4)(C), the latter provisions are not redundant because they are subject to special remedial authority which is not applicable with respect to Section 8(b)(1)(A). Upon issuance of a complaint involving an 8(b)(4) violation, Section 10(l) of the Act requires that application be made to the appropriate federal district court for temporary injunctive relief. No such drastic remedy is available with respect to Section 8(b)(1)(A) violations, except to the extent that Section 10(j) of the Act vests the Board with a discretionary authority to seek injunctive relief in particular cases.[24]

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[23] As was pointed out with respect to the relation between Section 8(1) and the succeeding unfair labor practice provisions of the Wagner Act: "The four succeeding unfair-labor practices are designed not to impose limitations or restrictions upon the general guaranties of the first, but rather to spell out with particularity some of the practices that have been most prevalent and most troublesome." S. Rep. No. 573, 74th Cong., 1st Sess., p. 9.

[24] Injunctive relief under Section 10(j) of the Act has been deemed by the Board as extraordinary and application therefor has been sought in relatively few instances. See, *e.g.*, Twenty-second Annual Report of the Board (Govt. Print. Off., 1958), p. 142; Twenty-first Annual Report of the Board (Govt. Print. Off. 1957) p. 152.

3. The contention that other portions of the legislative history negate the Board's interpretation of Section 8(b)(1)(A)

The court below found confirmation for its holding in the "Legislative history and post-legislative history" (R. 186).

(a) Insofar as the former is concerned, the Court appears to be referring to the emphasis given in the legislative history of Section 8(b)(1)(A) to proscribing violence and direct economic reprisals by unions.[25] But, to assign conclusive significance to this material, is to view the legislative history too narrowly. No inference of exclusiveness may be drawn merely from extensive Congressional consideration of particular subject matter which is included in general statutory language. Cf. *American Stevedores* v. *Porello,* 330 U.S. 446, 450–454. Particularly is this true, where, as here, "the language used in the statute goes beyond th[e] limited purpose [emphasized in the legislative debates]." *National Labor Relations Board* v. *Lion Oil Co.,* 352 U.S. 282, 292. Moreover, as we have shown (pp. 25–32), the principal proponents of Section 8(b)(1)(A) plainly indicated that the concern of this provision was not violence alone, however important the purpose to curb violence may have been, but included peaceful conduct which impaired employee rights, as well. Viewed in this posture, nothing in the legislative history of Section 8(b)(1)(A) requires removing from its scope peaceful conduct which, be-

[25] Thus, the court cites (R. 186, n. 5) Board Member Murdock's dissenting opinion herein (R. 46), which dwells on this point.

cause of its inherent threat of economic harm, is fairly within the language of that Section.

(b) The Court's reference to the post-legislative history presumably refers to the Joint Committee Report of 1948.[26] This Report, subscribed to, *inter alia*, by Senators Taft and Ball, contains the statements that: "Present law in no way limits the primary strike for recognition except in the face of another union's certification." "A labor organization may lose an election in which it was the only union on the ballot and the next day call a legal strike to force the employer to recognize it as the bargaining agent for those employees who have just rejected it." Report of the Joint Committee on Labor-Management Relations, S. Rep. No. 986, Pt. 3, 80th Cong., 2d Sess., p. 71; see also pp. 85–87. However, as this Court has noted, this "1948 committee report is no part of the legislative history of a statute enacted in 1947." *National Labor Relations Board* v. *Lion Oil Co.*, 352 U.S. 282, 291.[27]

[26] The Joint Committee was established by Section 401 of the Labor Management Relations Act, 1947, and was directed, *inter alia*, to study "the administration and operation of existing Federal laws relating to labor relations." The Final Report of the Committee was submitted to the Congress on December 31, 1948, a year and one-half after enactment of the 1947 amendments to the Act.

[27] In the *Lion Oil* case, and also in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 75, n. 14, the Court referred to the report, but merely to show that it was consistent with the conclusions reached by the Court in *Lion Oil*, as to the meaning of Section 8(d) in a contract reopening situation; and in *Arkansas Oak Flooring*, as to the legality of a majority strike for recognition. The report was also cited in *American Newspaper Publishers Association* v. *National Labor Relations Board*, 345 U.S. 100, 108, n. 8, but only to refer to a matter

Moreover, it is not clear from the context of the Joint Committee's remarks whether the situation to which they refer is one where, unlike this case, the union striking for recognition has acquired the support of a majority of the employees.[28] Thus, immediately after the statements referred to above, the Report points out that a recognition strike may be supported by legitimate reasons where a union "acquire[s] an overwhelming majority within a few weeks following an election in which it has been rejected by the employees." Report, *op. cit.*, p. 71. But, even if the Committee's remarks went beyond that situation, there is a question as to whether it purported to describe *its* understanding of the Congressional intent as to strikes for recognition, or merely the law as then interpreted by the Board. Since the Committee's function was to report upon "the administration and operation" of the 1947 amendments (Section 402(7) of the Labor Management Relations Act), its comments respecting recognition strikes might reasonably be viewed merely as descriptive of its understanding of Board decisions in this area of the law, which, at that time, had applied Section 8(b)(1)(A) only to violence and related types of unlawful means (see n. 11, p. 27, *supra*). Thus, in its preliminary report, submitted nearly a year before the final report, the Joint Committee made no assertions as to whether

which had been committed to the Joint Committee's study. In none of these references did the Court suggest that the Report constituted an accurate guide as to Congressional intent at the time of the enactment of the 1947 amendments to the Act.

[28] This was the situation in *Arkansas Oak Flooring*, *supra*, 351 U.S. at 66, 69, 75.

Section 8(b)(1)(A) proscribed minority union strikes for recognition, but only noted that this issue had been raised in *Perry-Norvell Co.*, 80 NLRB 225, which was then pending before the Board. Report, *op. cit.*, Pt. 1, p. 28. And in its final report, at a point subsequent to the statements referred to above, the Joint Committee cited the *Perry-Norvell* decision, which had been handed down in the interim, in support of its conclusion "that such a strike is not an unfair labor practice." *Id.*, Pt. 3, p. 85. Whether the Joint Committee was correct in its reading of the *Perry-Norvell* case is, of course, immaterial (see n. 11, p. 27, *supra*). The significant fact is that the Report appears to be describing a Board decision, and not the intention of Congress a year and a half earlier.

For these reasons, we submit that the Report of the Joint Committee does not shed any conclusive light on the issue here, nor impair the Board's conclusion that the union's picketing was within the ban of Section 8(b)(1)(A) of the Act.

II. IN THE BOARD'S VIEW, THE NEW AMENDMENTS TO THE ACT DO NOT AFFECT THE VALIDITY OF THE ORDER HERE

As indicated p. 12, *supra*, subsequent to the entry of the order here and the ruling of the court below, Congress amended the Act. The new amendments, effective November 13, 1959, add a new unfair labor practice provision, Section 8(b)(7),[29] which specifically proscribes picketing for an object of:

[29] The relevant provisions of the new Act are set out in full in the Appendix, pp. 65–66, *infra*.

> * * * forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:
>
> (A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act,
>
> (B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or
>
> (C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing * * *.

This provision covers the type of activity involved here, *i.e.*, picketing for recognition by a minority union. However, it is the Board's position that the new provision neither shows that the Board lacked power to regulate this subject previously under Section 8(b)(1)(A), nor displaces that Section as a means for regulating the subject. Rather, in the Board's view, the new Section 8(b)(7) merely supplements the power already conferred by Section 8(b)(1)(A). If that is so, the former does not affect the validity of the order here.

The legislative history of Section 8(b)(7) indicates that Congress was aware that the question of the Board's authority to reach picketing and related activity, in furtherance of a minority union's quest for recognition, under Section 8(b)(1)(A) was pending in the courts. The new provision was added in part as an insurance measure—*i.e.*, in case the courts were ultimately to decide that power did not exist under Section 8(b)(1)(A)—and in part, the Board believes, because of Congress' conclusion that the subject should be regulated even beyond that permitted by the Board's interpretation of Section 8(b)(1)(A). The new provision covers organizational picketing as well as recognition picketing, irrespective of whether the union involved is a majority or a minority union; on the other hand, Section 8(b)(1)(A), under the Board's interpretation, reaches only activity by a minority union and then only when its object is recognition (see pp. 33–34, 37, n. 16, *supra*).

The Board's position is supported by the statement made by Congressman Landrum, in introducing the provision which, with some modification in the Conference Committee, became the present Section 8(b)(7). The bill reported by the House Labor Committee, similar to the one which had passed the Senate, banned picketing for recognition or organizational purposes only where the employer was recognizing another union, or where the employees had voted against a union within the preceding nine months and the picketing union had not thereafter acquired majority support. Criticizing these

restrictions as inadequate, Congressman Landrum proposed that organizational or recognition picketing should be banned "where another union has been lawfully recognized; where a valid election has been held within the preceding 12 months; where the union cannot show that it represents at least 30 percent of the employees; and, where picketing has been in progress for a reasonable time—not exceeding 30 days—and no petition for an election has been filed" (105 Cong. Rec. (Daily Ed.) 14183, August 11, 1959). In support of this position, he stated (*ibid.*):

> For years subsequent to the passage of the Taft-Hartley law the Board did not condemn either recognitional picketing or organizational picketing by a union not representing a majority of the employees. In the *Curtis Brothers* decision, 119 NLRB No. 33, however, the Board finally * * * held that picketing for recognition by a union after it had lost a representation election was unlawful for 1 year. The U.S. Court of Appeals for the District of Columbia disagreed, holding that, under present law, minority picketing whether for "organizational" or "recognitional" purposes was lawful * * * absent certification of another union by the Board. In another case where facts are identical, the Fourth Circuit Court of Appeals disagreed and the matter is now pending on certiorari in the Supreme Court. *There is, therefore, no definitive or final word even as to this area of picketing activity.*
>
> The committee bill, however, would limit this limited proscription, by allowing minority picketing after 9 months, subsequent to a lost elec-

tion, or even allowing picketing immediately after a lost election if the union then claimed that it has signed up on application cards a majority of the employees * * *.

But this is not all. Neither the committee bill nor present NLRB law even pretends to deal effectively with organizational picketing. As a matter of fact, *the Board, in applying the Curtis decision principle, repeatedly has made it clear that its decision was in no way concerned with organizational picketing.* Nor would advertising picketing, or picketing to strengthen the union's bargaining position with other employers be limited under either the committee bill or NLRB case law. [Emphasis added.][30]

In sum, the Board believes that Congress, in enacting Section 8(b)(7), did not intend to affect or resolve the question of whether the Board already had power to reach some of the activity encompassed therein under Section 8(b)(1)(A).[31] Accordingly, if, as we have shown in Point I, Section 8(b)(1)(A) was in fact designed to permit the Board to reach the type of activity here, nothing in the enactment of the new Section 8(b)(7) impairs that conclusion, and hence

[30] See also, H. Rep. No. 741, 86th Cong., 1st Sess., p. 98 (dissenting views); 105 Cong. Rec. (Daily Ed.) 14515–14516 (August 13, 1959, Representative Clem Miller). And note S. Rep. No. 187, 86th Cong., 1st Sess., pp. 76–77 (minority views); 105 Cong. Rec. (Daily Ed.) 5964, 5969 (April 24, 1959, Senators Cooper and Goldwater).

[31] Even if its intention had been otherwise, the views of a Congress acting 12 years afterward could hardly be an accurate reflection of what the Congress which enacted Section 8(b)(1)(A) sought to encompass therein. See *United States* v. *Mine Workers*, 330 U.S. 258, 282; *Rainwater* v. *United States*, 356 U.S. 590, 593.

the Board's order in this case was validly issued under Section 8(b)(1)(A).

The question which remains is whether, even if the Board's order were valid when issued, it must nevertheless be qualified by the conditions imposed by the new Section 8(b)(7). Thus, it may be urged that, since the latter section now regulates the activity here less stringently in some respects than would section 8(b)(1)(A),[32] the order herein must be modified accordingly. For it is a general principle that an injunction, having only prospective effect, will be modified in the light of changes of law which subsequently occur (see *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 18 How. 421, 431–432).

Section 8(b)(7) concludes with the following savings clause: "Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b)." In the Board's view, this clause makes a modification of the order herein unnecessary. That is, assuming that Section 8(b)(1)(A) of the 1947 Act proscribed picketing and related activity by a minority union in furtherance of a recognition objective, the Board thinks that the savings clause should be read as preserving that section as a supplemental means for regulating such conduct, and thus any order issued thereunder is entitled to stand without regard to the requirements of Section 8(b)(7).[33] Since Section

[32] As more than 12 months have elapsed since the Board election, Section 8(b)(7)(C) would appear to permit the union to resume picketing for a reasonable period of time not to exceed 30 days.

[33] The Board has enunciated this position in the *Sierra Fur-*

8(b)(7) covers only picketing, Section 8(b)(1)(A) would still serve as the only means for the Board to regulate other devices, *e.g.*, unfair listing and boycott appeals, which a minority union may employ to further a recognition objective (see n. 4, p. 16, *supra*). Moreover, the Board feels that there may even be some picketing situations where it would be desirable to proceed under Section 8(b)(1)(A) rather than under Section 8(b)(7). For these reasons, the Board believes that Congress, in enacting Section 8(b)(7), did not intend to displace Section 8(b)(1)(A), but only to supplement it.

Nor does the Board believe that its interpretation of the savings clause in Section 8(b)(7) is impaired by the Statement of the Managers on the Part of the House, in the Conference Report, that (H. Rep. No. 1147, 86th Cong., 1st Sess., p. 41): "Section 8(b)(7) overrules the *Curtis* and *Alloy* cases to the extent that those decisions are inconsistent with section 8(b)(7)." It is not clear whether the reference is to the Board deci-

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niture case, 125 NLRB No. 20, decided on November 17, 1959, shortly after the new amendments took effect. There, concluding that the new Section 8(b)(7) did not preclude the issuance of an order under Section 8(b)(1)(A), against picketing similar to that here, the Board stated (125 NLRB No. 20, n. 6): "We believe that the new provisions concerning recognition and/or organizational picketing merely amplify the National Labor Relations Act's Section 8(b) proscriptions. The pertinent Section of the amendments, 704(c) of Title VII, specifically provides: 'Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).' We have already determined that Section 8(b)(1)(A) prohibits minority recognition picketing." Member Fanning dissented.

sions in those cases, or to the court decisions overruling the Board, or to both. However, in the Board's view, it is significant that Congress was aware of the *United Rubber Workers* (*O'Sullivan*) case, *supra*, where the Board was sustained by the Fourth Circuit, and there was no mention in the Legislative History of any intent on the part of Congress to overrule *Rubber Workers*. In any event, since the statement purports to describe the effect of Section 8(b)(7), and not of Section 8(b)(1)(A), the Board reads it as meaning only that, insofar as the courts had previously held that the Board lacked power to regulate picketing for recognition or organizational purposes where another union had not been certified, power was now specifically supplied in Section 8(b)(7)—without passing on whether the Board already possessed the power asserted by it under Section 8(b)(1)(A).

CONCLUSION

For the foregoing reasons, the Board submits that the judgment of the court below should be reversed and the case should be remanded with instructions to enforce its order.[34]

Respectfully submitted.

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NOVEMBER 1959.

[34] This submission is based on the premise that the Court agrees with the Board that new Section 8(b)(7) has supplemented, rather than displaced *pro tanto*, Section 8(b)(1)(A). If, however, the Court adopts the contrary view, the order should be modified to conform to Section 8(b)(7).

APPENDIX

A. The relevant provisions of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947 (61 Stat. 136, 29 U.S.C. 141, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided,* That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; * * *

* * * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9; (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to

employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. * * *

(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

* * * * *

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8(b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except

cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor

organization and make such organization a party to the suit. In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D).

* * * * *

LIMITATIONS

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

B. The relevant amendments to the National Labor Relations Act made by the Labor-Management Reporting and Disclosure Act of 1959 (73 Stat. 519, 542, Pub. Law 86-257), are as follows:

BOYCOTTS AND RECOGNITION PICKETING

SEC. 704. * * * (c) Section 8(b) of the National Labor Relations Act, as amended, is amended by striking out the word "and" at the end of paragraph (5), striking out the period at the end of paragraph (6), and inserting in lieu thereof a semicolon and the word "and", and adding a new paragraph as follows:

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question con-

cerning representation may not appropriately be raised under section 9(c) of this Act,

(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or

(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).

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